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No. 84-1538

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1985

ALEXANDRA FISHER, MARGUERITE JACOBS, MORT BAKER, RICHARD LAWHORN and ANTHONY KERSHAW, individuals; and LEVIN-ZEMEL, a California corporation,
*Appellants,*

vs.

CITY OF BERKELEY, CALIFORNIA, a municipal corporation; BERKELEY CITY COUNCIL, and BERKELEY RENT STABILIZATION BOARD,
*Appellees.*

**ON APPEAL FROM THE CALIFORNIA SUPREME COURT**

## BRIEF IN SUPPORT OF APPELLEES FILED BY AMICUS CURIAE CITY AND COUNTY OF SAN FRANCISCO

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## TABLE OF CONTENTS


| | | Page |
|---|---|---|
| TABLE OF AUTHORITIES | | ii |
| I. | STATEMENT OF INTEREST | 1 |
| II. | SUMMARY OF ARGUMENT | 2 |
| III. | ARGUMENT | 3 |
| | A. Neither Berkeley's Ordinance Nor Others Should Be Invalidated on the Record Here | 3 |
| | B. Judicial and Legislative History Suggests No Antitrust Concern With Governmental Activities | 7 |
| | C. The State Action Doctrine Should Not Be the Only Limit on Local Government Antitrust Liability | 8 |
| IV. | CONCLUSION | 11 |

## TABLE OF AUTHORITIES


CASES — PAGE

*Apex Hosiery Co.* v. *Leader*, 310 U.S. 469 (1940) ..... 8
*City of Lafayette* v. *Louisiana Light and Power Co.*, 435 U.S. 389 (1976) ..... 2, 7, 8
*Community Communications Co.* v. *City of Boulder*, 455 U.S. 40 (1982) ..... 2, 8
*Eastern Railroad Presidents' Conference* vs. *Noerr Motor Freight*, 365 U.S. 127 (1961) ..... 7
*Fisher* v. *City of Berkeley*, 37 Cal.3d 644, 209 Cal.Rptr. 682 (1984) ..... 10
*Hozz* v. *City and County of San Francisco*, No. 817-405 (San Francisco Superior Court, 1985) ..... 6
*Klor's* v. *Broadway-Hale Stores*, 359 U.S. 207 (1959) ..... 7
*Marjorie Webster Jr. Col.* v. *Middle States Ass'n of Colleges*, 432 F.2d 650 (D.C. Cir. 1970) ..... 7
*New State Ice House* v. *Liebman*, 285 U.S. 262 (1932) ..... 9
*Parker* v. *Brown*, 317 U.S. 341 (1943) ..... 2, 7
*Rice* v. *Norman Williams Co.*, 458 U.S. 654 (1982) ..... 8
*State of Missouri* v. *National Organization for Women*, 620 F.2d 1301 (8th Cir. 1980) ..... 8
*Town of Hallie* v. *City of Eau Claire*, 105 S. Ct. 1713 (1985) .. 2
*Traweek* v. *City and County of San Francisco*, No. C-83-5640 TEH (N.D. Cal., filed August 10, 1983) ..... 6

CONSTITUTION, STATUTES AND ORDINANCES

Sherman Act, 15 U.S.C. 1 (1982) ..... *passim*
California Constitution, Article XI, Section 7 ..... 7
San Francisco, Ca., Municipal Code, Administrative Code, Ch. 37 (1983) ..... 3, 4, 5

OTHER AUTHORITIES

Bureau of the Census, U.S. Dept. of Commerce & U.S. Dept. of Hous. and Urban Dev., Current Housing Reports No. H-170-82-39, Annual Housing Survey: 1982, San Francisco-Oakland, Ca. (1984) ..... 4
H. Rep. 98-965, 98th Cong., 2d Sess. (1984) ..... 8
Housing Production and Performance Under Rent Stabilization, Rent Stabilization Division, Community Development Department, City of Los Angeles (1985) ..... 5
Hamilton, Rabinovitz, Szanton & Alschuler and the Urban Institute, The Los Angeles Rent Stabilization System: Impacts and Alternatives (1985) ..... 4, 5


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### I. STATEMENT OF INTEREST

The City and County of San Francisco has a rent stabilization ordinance, although one which differs from that of the City of Berkeley. Many other nontraditional San Francisco legislative programs could also be directly affected by the decision in this case: for example, ordinances regulating the conversion to tourist or non-residential use of hotels and apartments, in order to preserve the housing stock; ordinances imposing fees on new commercial development to recoup part of the cost or demand such developments impose on transit, housing and other services; an ordinance regulating escort services (primarily women who "escort" male visitors); an ordinance regulating conversion

of full-service gasoline stations to self-service; an ordinance concerning City contracts with minority and woman-owned business enterprises. None of these ordinances is specifically mandated by the State of California; all affect commercial competition. San Francisco, like Berkeley, is a California charter city, whose authority under state law generally parallels that of the City of Berkeley.

## II. SUMMARY OF ARGUMENT

The judicial and legislative history of the federal antitrust law makes it clear that the Sherman Act was not intended or designed to control the acts of government *qua* government at any level. *City of Lafayette* v. *Louisiana Light & Power Co.*, 435 U.S. 389 (1976) signaled that where governments step into the shoes of private economic actors, they may be challenged if they take advantage of their governmental status to engage in acts prohibited to their private competitors. *Community Communications Co.* v. *City of Boulder,* 455 U.S. 40 (1982) gave warning that governments might not escape challenge, merely because they were acting within their authority under state law, if they took steps which could improperly favor one private competitor over another. Appellants in this case take a giant step further. They ask the Court to invalidate a regulation which advances no interest which government has in common with private economic actors and which favors no one private party against its competitors.

San Francisco agrees with respondent City of Berkeley that the Berkeley rent law is protected under the Sherman Act by *Parker* v. *Brown,* 317 U.S. 341 (1943) and *Town of Hallie* v. *City of Eau Claire,* 105 S. Ct. 1713 (1985). However, the "state action" doctrine of those two cases cannot by itself separate all local government activity which is consistent with federal antitrust law from activity which contravenes antitrust policies. The California Supreme Court correctly recognized that local government action cannot be considered and judged as if it were that of a private actor or actors, irrespective of how specifically it is authorized under state law. This brief argues that where local government does not act to further its own economic interest as a competitor with private enterprises, and



does not improperly favor one private competitor over another, it should not be subject to scrutiny under federal antitrust law. State action analysis alone cannot insulate from antitrust defeat legitimate local government activity which is innovative, which is unquestionably proper but not favored by a statewide political majority, or which is simply sufficiently controversial that state bodies take no action to mandate or disapprove it.

Appellants make much of the supposed evils of "rent control." Such factual matters should have been raised in the state trial court, not by interjecting a new issue on appeal, as appellants did here. The Court should decline appellants' invitation to invalidate in the abstract a wide range of local rent laws. In its experience with rent regulations, San Francisco has seen evidence of benefits and no evidence of any economic effect which should be of concern under the federal antitrust laws. Focusing narrowly on "rent control" also distracts attention from the full significance of appellants' analysis, which would invalidate many other programs.

## III. ARGUMENT

### A. Neither Berkeley's Ordinance Nor Others Should Be Invalidated on the Record Here

Perhaps because supporting legal authority is scant, appellants' argument rests in significant part on conclusory claims about the evils of "rent control." While this brief cannot address either "rent control" in the abstract or the effects of Berkeley's rent law, it is possible to explain briefly the workings of San Francisco's rent law, as one example of "rent control." Such an examination casts profound doubt on any blanket claim that rent regulation as such falls afoul of the antitrust laws.

San Francisco's rent law[1] affects rents only while the same tenants keep their apartments (Ordinance Section 37.3A(a)).

[1] The full text of the law appears as Chapter 37 of the San Francisco, Ca., Administrative Code (1983), a division of the Municipal Code. Recognizing that no San Francisco ordinance is at issue, that the role of this amicus curiae brief is necessarily limited and that great demands are placed on the Court's time and attention, the text of this ordinance and the five others briefly described in the text have not been filed. The text of any or all of the ordinances mentioned will promptly be furnished to the Court and all parties if the Court requests, or to any party appearing in this case on that party's request.

Vacant apartments may be rented for any amount a landlord and tenant choose. During approximately two-and-one-half years after San Francisco adopted its rent law in 1979, more than half of San Francisco's rental units changed hands at least once.[2] Rents for most units are thus periodically completely freed from regulation.

In addition, rents for apartments which continue to be occupied by the same tenants may be raised without application and as a matter of right, according to the rate of inflation (with a floor of four percent annually and a ceiling of seven percent annually).[3] Ordinance §37.3A(a)(1). Increased utility costs may be recovered as a matter of right. Ordinance §§37.2(o), 37.2(s), 37.3A(a)(4). Additional increases are available, following application and hearing, to recover the cost of capital improvements (Ordinance §§37.3A(a)(3), 37.7(a)), to recover unusual increases in operating costs (Ordinance §§37.3A(a)(6), 37.8(e)(4)(A)), to equalize rents of comparable units (Ordinance §§37.3A(a)(6), 37.8(e)(4)(B)) and to insure a fair return (Ordinance §37.8(f)(3)).

No comprehensive study has been done of the effects of San Francisco's rent law. However, a study was completed in April, 1985 for the Los Angeles rent law (enacted in 1979, following a 1978 rent increase moratorium).[4] Like San Francisco's law, the Los Angeles law does not control vacant apartment rents, allows an inflation-based annual increase as of right and allows recovery of utility cost increases and capital improvements costs. It does not provide specific relief for cost increases or to equalize rents of comparable units, as San

[2] Bureau of the Census, U.S. Dept. of Commerce & U.S. Dept. of Hous. & Urban Dev., Current Housing Reports No. H-170-82-39, Annual Housing Survey: 1982, San Francisco-Oakland, Ca. (Aug. 1984), Table A-1, p. A-5. The statistic in question also includes the smaller City of Oakland, which has a rent ordinance somewhat similar to San Francisco's.

[3] The inflation adjustment is reduced to take partial account of the historical limitation of landlords' variable costs to a fraction of gross rents.

[4] Hamilton, Rabinovitz, Szanton & Alschuler and The Urban Institute, The Los Angeles Rent Stabilization System: Impacts and Alternatives (April, 1985; available from the Rent Stabilization Division, Community Development Department, City of Los Angeles) [hereinafter the "Los Angeles Report"].



Francisco does, though it does provide for increases to assure a fair return. Among the major conclusions of the Los Angeles study were:

1. Rent regulation had not greatly affected the aggregate rent received by Los Angeles landlords as a whole. Los Angeles Report at 12, 32.

2. Rent regulation had shifted rents as among tenants, benefitting long-term tenants but, because of decontrol on vacancy, raising the rents of recent movers. Los Angeles Report at 32-33.

3. Elderly, single-member and low-income households benefitted the most. Los Angeles Report at 49.

4. Tenants valued the security gained by regulating rent increases as much as or more than any financial saving. Los Angeles Report at 48.

A companion report found that Los Angeles landlords' operating income continued to be healthy, and that there was little evidence that maintenance of rental properties had been affected. Housing Production and Performance Under Rent Stabilization, Rent Stabilization Division, Community Development Department, City of Los Angeles (April 1985), 3-4. Like San Francisco's, the Los Angeles rent law exempts new construction (San Francisco Ordinance §37.2(p)(6)).

These conclusions suggest that a rent law like San Francisco's does not substantially affect long-term market performance, while having benefits which are within the appropriate sphere of local government and which can be legitimately seen by a reasonable local governing body as outweighing the arguable economic effects. Certainly in a context of rapidly rising rents, as has existed in San Francisco and Los Angeles, relatively small changes in overall rents may be justified in order to provide a measure of stability to long-term tenants, who are disproportionately elderly and low-income, and to provide greater predictability to all tenants. There is no occasion to invalidate "rent control" in any specific form or in

general on the factual record before the Court.[5] It is exceedingly doubtful that such questions should ever be resolved under the antitrust laws. The difficulty of deciding such issues with due sensitivity to the legislative choices of local governments argues powerfully against extending antitrust scrutiny to governmental actions in general.

Similar difficulties would arise with other San Francisco ordinances, like those noted in the Statement of Interest of this brief. Those ordinances are, San Francisco believes, wholly proper under state law yet—on appellants' interpretation at least—may not be authorized or contemplated by the state. Appellants' arguments would sweep up those programs, and other programs in other cities, along with the Berkeley rent law.

Most government programs can be analogized to private agreements which would violate the antitrust laws. Such analogies are a poor substitute for meaningful analysis. Governments do not share the interests and motivations of private economic actors.

Private parties could not, taking one possible comparison with San Francisco's residential conversion laws, agree to stay in one line of business and not enter another. Private parties could not, as on one view of San Francisco's housing and transit fee ordinances, agree each to pay identical charges as a condition of doing business. Private parties could not, as in one view of San Francisco's gasoline station ordinance, agree to remain in one line of business and change to another only under identical procedures. Private parties could not, as in one view of San Francisco's "escort" service ordinance, agree to all maintain and make available identical information about their customers. Private parties could not, as in one view of San

[5] San Francisco has defended its rent law against an antitrust challenge in a trial on the merits, in a case entitled *Hozz* v. *City and County of San Francisco*, San Francisco Superior Court No. 817-405, judgment entered April 23, 1985, notice of appeal filed July 3, 1985. The trial lasted 18 days before a judge and involved extensive expert testimony for which the City incurred fees of approximately $60,000.00. The ordinance was upheld.

Another and perhaps more dramatic example of the costs of defending municipal antitrust actions is *Traweek* v. *City and County of San Francisco* , No. C-83-5640 TEH (N.D. Calif., filed August 10, 1983). In that case, challenging an amendment to San Francisco's condominium ordinance, the City has employed outside counsel whose fees to date exceed $300,000. Discovery is now proceeding in the case.



Francisco's minority business ordinance, agree on and enforce any form of differential consideration for minority entrepreneurs.[6] These programs, like rent regulations, deserve individual and factual scrutiny, not conclusory antitrust labelling. Their wisdom is a legislative matter, not ready subject matter for the Sherman Act.

### B. Judicial and Legislative History Suggests No Antitrust Concern With Governmental Activities

Perhaps the best evidence of the intended inapplicability of the Sherman Act to local governmental activities in general is that, for the nearly ninety years from its enactment in 1890 (ch. 647, 26 Stat. 209) to *City of Lafayette* in 1978 (435 U.S. 389), there was no precedent for liability for such activities. Courts which commented on the scope of the antitrust laws dismissed the prospect of antitrust sanctions other than for business or commercial activity. The Sherman Act "is aimed primarily at combinations having commercial objectives and is applied only to a very limited extent to organizations, like labor unions, which normally have other objectives." *Klor's* v. *Broadway-Hale Stores*, 359 U.S. 207, 213 n. 7 (1959). Activity "distinct from the sphere of commerce" falls outside the Sherman Act unless governed by commercial motives. *Marjorie Webster Jr. Col.* v. *Middle States Ass'n of Colleges*, 432 F.2d 650, 655 (D.C. Cir. 1970), *cert. denied* 400 U.S. 965 (1970). "Where a restraint upon trade or monopolization is the result of valid governmental actions, as opposed to private action, no violation of the [Sherman] Act can be made out." *Eastern Railroad Presidents' Conference* v. *Noerr Motor Freight*, 365 U.S. 127, 136 (1961). The Sherman Act is aimed at business combinations by individuals and corporations, not governmental action. *Parker* v. *Brown*, 317 U.S. 341, 351-352 (1940).

[6] Ordinances which, if viewed as private economic actions, potentially contravene antitrust standards could be listed almost infinitely. Because much of California local governments' activity (including traditional zoning) is directly authorized only by a broad constitutional grant (California Constitution, Article XI, §7) much of such a list would not be state-authorized under appellants' analysis. The examples given in the Statement of Interest and the text above are limited to recent City ordinances with non-traditional subject matter which therefore appear most vulnerable to a claim they lack any direct or indirect state mandate.

Legislative history was generally understood to suggest a similar result. "The restraints at which the Sherman Law is aimed, and which are described by its terms, are only those which are comparable to restraints deemed illegal at common law . . ." *Apex Hosiery Co.* v. *Leader,* 310 U.S. 469, 498 (1940). The House Committee on the Judiciary found no reported case in which a "body politic", like a local government, as opposed to a private person or corporation, was subject to historical restraint of trade statutes. H. Rep. 98-965, 98th Cong., 2d Sess. (1984), at 5, n.2. "[T]he indication is that it was the competitors in commerce that Senator Sherman had in mind as the concern of his bill, not noncompetitors motivated socially or politically in connection with legislation." *State of Missouri* v. *National Organization for Women,* 620 F.2d 1301, 1309 (8 Cir. 1980), *cert. denied* 449 U.S. 842 (1980).

No recent decision of the Court has repudiated these principles. The Court has yet to find a local public entity has violated the antitrust laws, even by an activity not purely governmental. *See Boulder,* 455 U.S. at 56, n. 20; *Lafayette,* 435 U.S. at 417, n. 48. *City of Lafayette* and *Boulder* suggest, at most, that prior rulings and legislative intent may not protect actions by public entities which are also private competitors, or which take the part of one private competitor against another. The intended scope of the Sherman Act, and the accumulated learning of Sherman Act precedents, do not reach activity by governments as such, like the Berkeley rent law.[7]

### C. The State Action Doctrine Should Not Be the Only Limit on Local Government Antitrust Liability

Somewhat ironically, *City of Lafayette* and *Boulder,* two principal authorities cited for extending local government antitrust liability to purely governmental actions, simply reject blanket application of one defense, the so-called "state action" exemption. The "state action" doctrine on which *City of Lafayette* and *Boulder* turn is far from a sufficient test for ultimately determining municipal antitrust violation. Dis-

[7] Whether the Court views this case as raising solely a pre-emption issue (*see Rice* v. *Norman Williams Co.,* 458 U.S. 654, 659 (1982)) or an issue of "violation" of the Sherman Act, the Berkeley rent law still lies outside the scope of the Sherman Act.



qualification for the exemption does not imply an antitrust violation. The state action doctrine should not supplant traditional limitations on applying the antitrust laws to non-commercial activities.

The "state action" doctrine, applied as an exclusive test, would powerfully undercut the autonomy of local government. It would also systematically impede local governments' ability to fulfill their roles as innovators. Cf. *New State Ice House Co.* v. *Liebman,* 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). It would frustrate local responses to problems which were controversial on the state level. Finally, it would cast state legislators and judges in the unlikely role of ultimate arbiters of municipal antitrust liability.

Most municipal activity would be prohibited by the antitrust laws if accomplished by private agreement. Local police forces are monopolies; other persons' rights to make arrests, patrol public places and initiate prosecutions are narrowly limited. Public streets are monopolies; tax funds for maintenance, rights of way and traffic control are denied to competitive networks. The superficial facility with which antitrust analysis can be applied to rent control is but one illustration of how the bulk of local government activity can be called into question by using traditional antitrust categories, appropriate for private competitors. The premise of government is not competition. The premise of government is that the public may undertake, by democratic means, tasks which would be impossible or inappropriate for private citizens.

Important classes of local actions would be jeopardized by judging local government by the assumptions of competition, even with a "state action" exemption. Contemplation or authorization by state legislatures or courts will probably save the bulk of traditional local government activity from being overturned under the Sherman Act. However, local actions which faithfully reflect local judgments of proper public policy would still be subject to antitrust challenge where state bodies disagree. The State of California has 441 incorporated municipalities, 58 counties and thousands of other local government entities, of widely varying size, character and political com-

plexion. No principle of existing law prohibits otherwise proper local policies which do not coincide with statewide political consensus. If only a specific state mandate can protect local action under the Sherman Act, however, this state law rule of autonomy will be displaced wherever local government action affects the economy—as it usually does.

Moreover, local innovations which state bodies simply had not anticipated—and which state bodies might prefer to see tested in practice before taking any position—would likewise be subject to antitrust challenge. Neither antitrust precedent nor policy calls for antitrust law to determine when local autonomy is permitted or which local innovations may survive.

"State action" doctrine is also unserviceable in determining municipal antitrust liability where a local policy is controversial at the state level. Legislative action on controversial issues—either pro or con—is often stymied. Neither antitrust precedent nor sound policy calls for invoking federal antitrust law to determine the fate of local government action when controversy at the state level results in inaction, or inconclusive action.

Exclusive reliance on the "state action" doctrine would also make state legislators the ultimate arbiters of antitrust law as it applies to local governments. There is no reason to believe they are specially qualified so to act. The "state action" doctrine rightly recognizes that federalism demands that the states be able to protect constituent local governments from antitrust challenge while the localities carry out state-authorized programs. The ability to torpedo local programs by failure to contemplate or authorize them within the meaning of the antitrust laws is not similarly necessary nor beneficial to federalism. States and the statewide citizenry already have state law powers to limit local action.[8] On the other hand, if state authorization or contemplation is the *sine qua non* for antitrust survival, state legislators and judges will find themselves deciding—wittingly or unwittingly--antitrust issues when they act

[8] Indeed, one result of applying commercial antitrust rules to local government, mitigated solely by the "state action" exception, would be to largely supplant the law which each state has developed to delineate the powers of its localities. *See*, e.g., the discussion of state law pre-emption in the California Supreme Court decision in this case, *Fisher* v. *Berkeley*, 37 Cal.3d 644, 704-709, 209 Cal.Rptr. 682, 729-732 (1984).



on division of state and local authority. Such debates are unlikely either to contribute to consistent antitrust results or successfully accommodate local autonomy and competition.

## IV. CONCLUSION

San Francisco agrees that rent control, in California now, is authorized and contemplated by the state. However, the California Supreme Court was right to recognize that other legal principles, applicable in this case, also called for upholding on antitrust grounds the ordinance challenged here. Those principles are outlined in prior cases which suggested limiting antitrust liability to commercial, as opposed to strictly governmental, activities. In this case, where the City of Berkeley is not an economic competitor and where it has not favored one competitor as against others, the Court should reject the antitrust challenge, irrespective of the "state action" doctrine.

Dated: September 12, 1985

Respectfully submitted,

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